Military Commissions Trial Judiciary
Guantanamo Bay, Cuba

UNITED STATES OF AMERICA	**AE 093**
v.	**Response/Opposition by 14 News Organizations to Potential Closure of Hearing on Defense Motions**
ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	July 12, 2012

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1. **Timeliness.** This Opposition is timely filed under the Rules of Court ("R.C.") in response to the Government's motion (AE 093) for an *in camera* hearing to determine the extent to which oral argument of two defense motions (AE 088 and AE 089) will be closed to the public. The Government's motion was first posted to the public website on July 6, 2012, and this opposition is filed within two weeks of that date. R.C. 3.7.c(1).

2. **Relief Sought.** Pursuant to Rules of Court 3.5.c and Regulations 17-1 and 19-3(c) & (d) of the 2011 Regulation for Trial by Military Commissions, The Miami Herald, ABC, Inc., Associated Press, Bloomberg News, CBS Broadcasting, Inc., Fox News Network, The McClatchy Company, National Public Radio, The New York Times, The New Yorker, Reuters, Tribune Company, Wall Street Journal, and Washington Post (collectively the "Press Objectors") respectfully submit this response to the Government's request for a Rule 505 conference, which suggests that portions of the hearing on two pending defense discovery motions (AE 088 and AE 089) will need to be closed to the public. The Commission should reject any request by the Government to close proceedings automatically whenever any classified information may be disclosed, and may properly deny public access to a proceeding only when secrecy is essential to avoid a clearly established risk of harm. Specifically, the public's

constitutional right to observe these proceedings may only be overcome if the Government demonstrates that (1) the disclosure of specific information would create a substantial probability of harm to a compelling governmental interest, (2) no alternative other than closure can avoid that harm, (3) closure will in fact be effective in preventing the threatened harm, and (4) the closure requested is narrowly tailored in scope and time.

3. **Burden of Proof.** Because these proceedings are subject to both a statutory and constitutional right of public access, the Government bears the burden of establishing a proper factual basis for closing any proceedings, in whole or in part. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986) ("*Press-Enterprise II*"); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123-24 (2d Cir. 2006); *ABC, Inc. v. Stewart*, 360 F.3d 90, 106 (2d Cir. 2004); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991).

4. **Statement of Facts.** Mr. al Nashiri stands accused of having orchestrated Al Qaida's bombing of the U.S. naval warship, the USS Cole, off Yemen in October 2000, resulting in the death of seventeen U.S. sailors. Mr. al Nashiri is the first U.S. detainee to face capital punishment if convicted in this Military Commission, and there is thus significant public interest in the Commission proceedings in this case. The court record includes allegations that Mr. al Nashiri was subjected to torture in U.S. custody, adding to the public's need to know.

Pending before the Commission are two sealed defense motions that, according to the docket entries, seek pre-trial discovery from two witnesses (whose identities are redacted from the public record) on facts relating to the "arrest, detention and rendition" of the defendant. Press Objectors do not know the complete focus or scope of the discovery requests, because the motions are entirely redacted in the public record. The Government's responses (AE088A and

AE089A), first made publicly available on July 11, 2012, articulate the government's legal position without ever fully disclosing the scope of discovery sought by defendant.

On July 6, a public filing was made of the Government request (AE 093) for a pre-hearing conference pursuant to Military Commission Rule of Evidence ("M.C.R.E.") 505(h)(1)(A) to determine the "use, relevance, or admissibility of classified information" at the hearing on defendant's discovery motions, and the extent to which the hearing would need to be closed to the public. The Government's motion is premised upon the view that the hearing necessarily will need to be closed during the discussion of any classified information.

5. Discussion. The Commission should deny the Government's over-reaching request for automatic closure of proceedings—by means of a white noise generator or otherwise—any time classified information may be discussed. The fact that information is deemed to be classified by the Government, alone, does not constitute a sufficient basis for overriding the public's constitutional rights, as the Government requests. Rather, the Government is required to identify to the Commission the specific secret facts whose disclosure would truly threaten national security or personal safety, and if the Commission finds that disclosure would indeed create a substantial probability of harm, then *only* discussion of those facts may be subject to initial exclusion of the public.

I.

COMMISSION PROCEEDINGS MAY NOT AUTOMATICALLY BE CLOSED ANY TIME CLASSIFIED INFORMATION IS DISCUSSED

A. The Press and Public Have An Affirmative Right of Access to Commission Proceedings

Both the Military Commissions Act ("MCA") and the Constitution of the United States recognize a qualified right of public access to the proceedings and records of the military commissions at Guantanamo.

1. Statutory Based Right of Public Access

In first adopting the Military Commissions Act in 2006, Congress recognized the critical importance that these proceedings be conducted in the open so the watching world would accept their validity. *See, e.g.*, 152 CONG. REC. H7522, H7534 (Sept. 27, 2006) (statement of Rep. Hunter); 152 CONG. REC. H7508, H7509 (Sept. 27, 2006) (statement of Rep. Cole); 152 CONG. REC. H7522, H7552 (Sept. 27, 2006) (statement of Rep. Hunter); 152 CONG. REC. H7925, H7937 (Sept. 29, 2006) (statement of Rep. Sensenbrenner); 152 CONG. REC. H7925, H7945 (Sept. 29, 2006) (statement of Rep. Sensenbrenner). Congress thus expressly mandated, in 2006 *and again in 2009*, that the commission proceedings must be open to the press and public, except in certain narrowly limited circumstances. *See* 10 U.S.C. § 949d(c)(2).

Consistent with this statutory mandate, the Department of Defense Regulation for Trial by Military Commission ("Regulation" or "Reg."), the Manual for Military Commissions ("Manual" or "R.M.C."), and the Military Commissions Trial Judiciary Rules of Court ("R.C.") all make plain that the proceedings are to be open to "representatives of the press, representatives of national and international organizations, . . . and certain members of both the military and civilian communities." R.M.C. 806(a). The "proceedings" open for public inspection include motion papers, rulings, and conference summaries that form the record. Under the Regulation, the right of access applies "from the swearing of charges until the completion of trial and appellate proceedings or any final disposition of the case." Reg. 19-2.

Under the MCA, proceedings of the Commission may only be closed to the public where a military judge makes a "specific finding" that closure is "necessary" to protect information "which could reasonably be expected to cause damage to the national security" or to "ensure physical safety of individuals." *See* MCA §949(c)(2). DOD cannot impose by regulation restrictions on access that are inconsistent with this statutory mandate. *See* 10 U.S.C. 949a(a)

("Pretrial, trial, and post-trial procedures" before military commissions, to be prescribed by Secretary of Defense, "may not be contrary to or inconsistent with this chapter."). Recognizing this fact, Reg. 19-6 states that "[t]he military judge may close proceedings of military commissions to the public *only* upon making the findings required by MCA § 949d(c) and R.M.C. 806." (Emphasis added.) *See also* Reg. 18-3 (requiring express finding, which "shall be appended to the record of trial").

2. Constitutional Right of Access

The First Amendment independently "protects the public and the press from abridgement of their rights of access to information about the operation of their government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584 (1980) (Stevens, J., concurring) (recognizing First Amendment right of public access to criminal trials); *Press-Enterprise Co. I*, 464 U.S. at 508 (Blackmun, J. and Stevens, J., concurring) (recognizing First Amendment right of public access to *voir dire* proceedings). The scope of this qualified constitutional right was first defined by the U.S. Supreme Court in *Richmond Newspapers*, a case involving access to a criminal trial that the State of Virginia had conducted entirely in secret. A Virginia statute granted the trial judge discretion to conduct a secret trial, but the Supreme Court held that the First Amendment created an affirmative, enforceable constitutional right of access to certain government proceedings that trumped the state statute.

The Court found this right to be implicit in the First Amendment's guarantees of free speech and press, just as the right of association, right of privacy, right to travel, the right to be presumed innocent and other rights are implicit in various provisions of the Bill of Rights.[1] As

[1] *See Id.* at 577 (Burger, J.) (the right of access is "assured by the amalgam of the First Amendment guarantees of speech and press" and their "affinity to the right of assembly"); *Id.* at 585 (Brennan, J., concurring) ("the First Amendment – of itself and as applied to the States through the Fourteenth Amendment – secures such a public right of access).

the Court later put it in *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 604, the First Amendment right of access is based upon,

> the common understanding that a "major purpose of that Amendment was to protect the free discussion of government affairs." By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. (Citation omitted.)

Richmond Newspapers "unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment." 448 U.S. 583 (Stevens, J. concurring).[2]

Under the "history and policy" analysis adopted by the Supreme Court, the constitutional right of access exists where government proceedings traditionally have been open to the public, and public access plays a "significant positive role" in the functioning of the proceeding. *E.g., Globe Newspaper*, 457 U.S. at 605-07; *Press-Enterprise II*, 478 U.S. at 8-9. While this right has most frequently been asserted to compel access to judicial proceedings, the right equally applies to proceedings conducted in the executive branch. *E.g., New York Civil Liberties Union v. New York City Transit Auth.,* 652 F.3d 247 (2d Cir. 2011) (administrative adjudication); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695-96 (6th Cir. 2002) (deportation hearings); *Whiteland Woods, L.P. v. West Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (planning meeting).

Applying the same history and policy analysis, the First Amendment right of access plainly applies to these proceedings:

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[2] Like any member of the public, the press has standing to be heard in opposition to the denial of public access. *See*, *e.g.*, *Globe Newspaper Co.,* 457 U.S. at 609 n.25 ("representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'") (citation omitted); *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997) (press has standing to complain if access is denied); *Denver Post Corp. v. United States*, Army Misc. 20041215, at *2 (A. Ct. Crim. App. Feb. 23, 2005) (noting "obvious" error in closing proceedings before allowing newspaper's counsel to address the issue).

Historical Experience. William Winthrop, known as the "Blackstone of Military Law" (*Reid v. Covert,* 354 U.S. 1, 19, n. 38 (1957) (plurality opinion)), described in his classic opus on military law a history of open military tribunals that dates back centuries:

> Originally, (under the Carlovingian Kings,) courts-martial . . . were held *in the open air*, and in the Code of Gustavus Adolphus . . . criminal cases before such courts were required to be tried "*under the blue skies*." The modern practice has inherited a similar publicity.

William Winthrop, MILITARY LAW AND PRECEDENTS 161-62 (rev. 2d ed. 1920). The same tradition of public access to courts-martial also runs through the history of military commissions. After all, commissions historically have "differed from the court-martial only in terms of jurisdiction." David W. Glazier, Notes, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2092 (2003). As the Supreme Court has explained:

> [T]he procedures governing trials by military commission historically have been the same as those governing courts-martial. . . . The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. *See* Winthrop 831. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission's procedures typically have been the ones used by courts-martial.

Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2788, 2792 (2006).[3]

With rare exception,[4] military commissions have been conducted publicly throughout our nation's history:

[3] The United States Court of Military Commission Review has also recognized that Congress intended the practices of military commissions to "mirror" those of courts-martial. *United States v. Khadr*, CMCR 07-001 at 23 & n.35 (Sept. 24, 2007) (citing and quoting MCA §§ 949a(a) & 948b(c)).

- During the Civil War, for example, members of the 1864 military commission of Lambdin P. Milligan and others retired from the room to deliberate in order "to avoid the inconvenience of dismissing *the audience assembled to listen to the proceedings*." William Winthrop, MILITARY LAW AND PRECEDENTS 289 (rev. 2d ed. 1920) (emphasis added and internal quotation marks omitted).

- The military commission established to try John Wilkes Booth's co-conspirators in Lincoln's assassination was opened to the public after reporters complained and Gen. Ulysses S. Grant "led them to the White House to talk to the president." *See* James H. Johnston, *Swift and Terrible: A Military Tribunal Rushed to Convict After Lincoln's Murder*, WASH. POST, F1 (Dec. 9, 2001).[5]

- The military commission that tried General Tomoyuki Yamashita in 1945 was also open to the press and public. *See* Ass'n of Bar of City of NY, *The Press and the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 22 CARDOZO ARTS & ENT. L.J. 767, 790 (2005).

The weight of experience across centuries supports the recognition of a public right of access to prosecutions in military courts.

Policies Advanced by Public Access. Justice Brennan wrote separately in *Richmond Newspapers* to underscore the crucial structural role of public access in criminal cases, describing open trials as "bulwarks of our free and democratic government." *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring). The Supreme Court in that case identified at least five distinct interests that are advanced by open proceedings, each of which applies to prosecutions by military commissions as well: (1) ensuring that proper procedures are

[4] A 1942 trial of Nazi saboteurs was conducted in secret, but that precedent underscores how secrecy is counterproductive in the long run. It is now widely believed that the "real reason President Roosevelt authorized these military tribunals was to keep evidence of the FBI's bungling of the case secret." *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism*, HEARINGS BEFORE THE SENATE COMM. ON THE JUDICIARY, 107th Cong. 377 (Nov. 28, 2001) (statement of N. Katyal, Visiting Professor, Yale Law School, and Professor, Georgetown University), *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=4f1e0899533f7680e78d03281fdabd2c&wit_id=4f1e0899533f7680e78d03281fdabd2c-0-0 (last visited July 11, 2012).

[5] The openness of these Civil War era commissions is particularly significant in light of the rampant suppression of the freedom of the press and "gross violations of the First Amendment" that otherwise occurred during the Civil War era. *See* William H. Rehnquist, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

being followed; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing an outlet for community hostility and emotion; (4) ensuring public confidence in a trial's results through the appearance of fairness; and (5) inspiring confidence in government through public education regarding the methods followed and remedies granted. *See id.,* 448 U.S. at 569-71.

Judges within the military justice system have long recognized that openness significantly assists the functioning of military tribunals in this very same fashion. Even before the Supreme Court first articulated the constitutional access right in *Richmond Newspapers*, the Court of Military Appeals had identified the functional benefits of public proceedings to include: (1) improving the quality of testimony; (2) curbing abuses of authority; and (3) fostering greater public confidence in the proceedings. *See United States v. Brown*, 22 C.M.R. 41, 45-48 (C.M.A. 1956). Just as in civilian courts, public access to military tribunals improves the performance of all involved, protects judges and prosecutors from claims of dishonesty, and provides a forum for educating the public. *See* Ass'n of Bar of City of NY, "*If it Walks, Talks and Squawks . . .*" *The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 23 CARDOZO ARTS & ENTERT. L.J. 21, 25 (2005).

For all the reasons cited in *Brown*, a long chain of precedent since *Richmond Newspapers* recognizes that the public's constitutional right of access extends to military tribunals. *See, e.g.*, *United States v. Anderson*, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997) (per curiam) (absent justification clearly set forth on the record, "trials in the United States military justice system are to be open to the public"); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (First Amendment right of public access extends to courts-martial); *United States v. Hershey*, 20 M.J. 433, 436, 438 n.6 (C.M.A. 1985) (finding First Amendment right of public access to a court-

martial proceeding); *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (same); *United States v. Story*, 35 M.J. 677, 677 (A. Ct. Crim. App. 1992) (per curiam) (same); *ABC, Inc. v Powell*, 47 M.J. 363 (C.A.A.F. 1997) (First Amendment right of access applies to investigations under Article 32).

As explained by Wigmore in his seminal treatise quoted in *Brown*, "[n]ot only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." Wigmore, *Evidence* (3d ed.) § 1834, quoted in *Brown*, 22 C.M.R. at 45; *see also United States v. Hood*, 46 M.J. 728, 731 n.2 (A. Ct. Crim. App. 1996). Openness is particularly important here, given the world-wide attention being paid to these proceedings:

> Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring). *See also United States v. Clark*, 475 F.2d 240, 247 (2d Cir. 1973) ("Secret hearings – though they be scrupulously fair in reality – are suspect by nature."); *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (public confidence can "quickly erode" when proceedings are closed); *United States v. Anderson*, 46 M.J. 728, 731 (A. Ct. Crim. App. 1997) (same). As one commentator has cautioned: "Conducting military commission trials today that fall short of both their historic purposes and contemporary standards of justice is likely to stain the reputation of both the American military and the American justice system as a whole." David W. Glazier, Notes, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2093 (2003).

B. To Overcome The Public's Access Rights, The Government Must Demonstrate A Substantial Probability Of Risk To National Security or Personal Safety

As an element of the supreme law of the land, the constitutional access right necessarily supersedes any contrary law, rule or regulation. While the constitutional access right is a qualified right, not an absolute right, a proceeding subject to the First Amendment right may be closed *only* if the party seeking to seal can satisfy a rigorous four-part test. Different verbal formulations have been used by various courts to define the showing that must be made, but the governing standard applied by the Supreme Court encompasses four distinct factors:

1. **There must be a substantial probability of prejudice to a compelling interest.** Anyone seeking to restrict the access right must demonstrate a substantial probability that openness will cause harm to a compelling governmental interest. *See*, *e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 582; *Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise II*, 478 U.S. at 13-14. In *Press-Enterprise I*, the Supreme Court stressed that a denial of access is permissible only when "essential to preserve higher values." 464 U.S. at 510. In *Press-Enterprise II* it specifically held that a "reasonable likelihood" standard is not sufficiently protective of the access right, and directed that a "substantial probability" standard must be applied. 478 U.S. at 14-15.

2. **There must be no alternative to adequately protect the threatened interest.** Anyone seeking to defeat access must further demonstrate that there is nothing short of a limitation on the constitutional access right that can adequately protect the threatened interest. *Press-Enterprise II*, 478 U.S. at 13-14. A "trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue." *In re The Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984).

3. **Any restriction on access that is imposed must be effective.** Any order limiting access must be effective in protecting the threatened interest for which the limitation is imposed. As articulated in *Press-Enterprise II*, 478 U.S. at 14, the party seeking secrecy must demonstrate "that closure would prevent" the harm sought to be avoided. *See In re The Herald Co.*, 734 F.2d at 101 (closure order cannot stand if "the information sought to be kept confidential has already been given sufficient public exposure"); *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1146 (9th Cir. 1983) (must be "'a substantial probability that closure will be effective in protecting against the perceived harm'" (citation omitted)).

4. **Any restriction on access must be narrowly tailored.** The Supreme Court has long recognized that even "legitimate and substantial" governmental interests "cannot be pursued by means that broadly stifle fundamental personal liberties

> when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960). Any limitation imposed on public access thus must be no broader than necessary to protect the threatened interest. *See, e.g., Press-Enterprise II*, 478 U.S. at 13-14; *Lugosch*, 435 F.3d at 124; *In re New York Times Co. (Biaggi)*, 828 F.2d at 116.

The adjudicatory tribunals of the military branches have applied these same standards to their proceedings. As explained in *Hershey*, "the party seeking closure must advance an overriding interest that is likely to be prejudiced [by openness]; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review." 20 M.J. at 436; *see also Anderson*, 46 M.J. at 729 ("[T]he military judge placed no justification on the record for her actions. Consequently, she abused her discretion in closing the court-martial."). The Army Court of Military Appeals has also applied this standard as the substantive prerequisite for a court to enter a "protective order" limiting public access to documents admitted into evidence in a court martial proceeding. *See Scott*, 48 M.J. at 665.

C. The Fact That Classified Information May Be Discussed is Not, By Itself, An Adequate Grounds for Closing A Commission Proceeding

Although the Government was able to articulate its opposition to the defense motions in a publicly filed document, it apparently seeks closure of any portions of the hearing on defendant's discovery motions where classified information is discussed. The Government, however, cannot justify the closing of a criminal proceeding simply by observing that "classified" information will be discussed, and asserting that "national security" concerns are thus automatically present. As Justice Black warned in the Pentagon Papers case:

> The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.

United States v. New York Times Co., 403 U.S. 713, 719 (1971) (Black, J., concurring). Advancing this same theme, the Fourth Circuit has aptly noted that "the mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to documents. . . . Rather, [courts] must independently determine whether, and to what extent, the proceedings and documents must be kept under seal." *United States v. Moussaoui*, 65 F. App'x 881, 887 (4th Cir. 2003) (unpublished) (internal citation omitted).

Consistent with their obligation to uphold public access rights, courts previously have rejected the argument that the heightened First Amendment closure requirements are satisfied automatically whenever classified information is involved:

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decision-making responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re Washington Post, 807 F.2d 383, 391-92 (4th Cir. 1986).

The MCA's provisions governing the handling of classified information in these proceedings are derived from, and premised upon, the Classified Information Procedures Act ("CIPA"). The CIPA statute does not trump presumption of access to a public trial. "Even disputes about claims of national security are litigated in the open." *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)); *see also United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

Notably, all courts to address the issue have uniformly held that CIPA neither purports to – nor could it – override the requirements of the First Amendment with respect to public access to the trial itself. *See, e.g.*, *In re Washington Post Co.*, 807 F.2d at 393 (even if CIPA "purported to resolve the issues raised here, the district court would not be excused from making the appropriate constitutional inquiry"); *Moussaoui*, 65 F. App'x at 887 (although press did not seek access to classified information, court noted "CIPA alone cannot justify the sealing of oral argument and pleadings"); *United States v. Poindexter*, 732 F. Supp. 165, 167 n.9 (D.D.C. 1990) ("CIPA obviously cannot override a constitutional right of access"); *United States v. Pelton*, 696 F. Supp. 156, 159 (D. Md. 1986) (holding that CIPA statute does not provide for the closure of a criminal trial and First Amendment standards must be satisfied prior to closure of criminal trial).[6] CIPA does not relieve the Government of its heavy constitutional burden to overcome the public's access right.

Notwithstanding CIPA, this Commission is required to make an independent assessment of whether the Government has met its burden, and may not blindly accept a blanket insistence of secrecy for all purportedly classified information. Merely because information is classified does not automatically mean that either a "likelihood" or a "substantial probability" exists that its disclosure in a criminal prosecution will harm our national security.[7]

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[6] *See also United States v. Rosen*, 487 F. Supp. 2d 703, 710 (E.D. Va. 2007) ("Closing a trial, even partially, is a highly unusual result disfavored by the law. A statute, even one regulating the use of classified information, should not be construed as authorizing a trial closure. . . . Rather, because a trial closure implicates important constitutional rights, CIPA should not be read to authorize closure absent a clear and explicit statement by Congress in the statutory language.")

[7] *See Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing*: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations of the Comm. on Government Reform, 108th Cong. 263 at 82-83 (2004) (statement of J. William Leonard, Director, Information Security Oversight Office, National Archives and Records Administration) (estimating that more than 50 percent of all classified government information has been improperly designated as such); *see also* Pub. L. 111-258, § 2, 124 Stat. 2648 (Oct. 7, 2010) codified at 6 U.S.C. § 124m & 50 U.S.C. §

To satisfy its constitutional burdens, before excluding the public the Government must make a factual showing that each step of the four-part test is satisfied with respect to specific items of information. Discussion only of those items may be withheld, even temporarily.

II.

THE GOVERNMENT SHOULD STRICTLY BE HELD TO ITS CONSTITUTIONAL BURDEN OF ESTABLISHING A PROPER FACTUAL BASIS FOR SECRECY

The Government's apparent request to close portions of the hearing on defendant's motions for discovery relating to his arrest, detention and rendition must be considered in light of all that is already publicly known about these issues. The Government cannot credibly establish a risk to national security or personal safety from discussion in the courtroom of information that is already widely known and available on the Internet. And the circumstances of Mr. al Nashiri's detention have already been the subject of significant public and press attention worldwide.

Reports include details about "enhanced interrogation techniques" employed on Mr. Nashiri (waterboarding, blindfolding the detainee and holding an electric drill near his ear, discharging a firearm in an adjacent holding cell), the government agency involved (CIA), and the locations where such techniques were utilized (e.g., Afghanistan, Thailand, Poland). Here, merely by way of illustration, is a non-exhaustive compilation of news reports and other publicly available reports that address, in significant detail, the treatment Mr. al Nashiri is alleged to have been subjected to while in U.S. custody:

NY Times

- Joanna Berendti & Nicholas Kulish, *Polish Ex-Official Charged With Aiding C.I.A.*, NEW YORK TIMES (Mar. 27, 2012), http://www.nytimes.com/2012/03/28/world/europe/polish-ex-official-charged-with-aiding-cia.html?scp=1&sq=nashiri+and+poland&st=nyt

135d (the Reducing Over-Classification Act) (congressional finding that "the over- classification of information . . . needlessly limits stakeholder and public access to information.").

- "In **Poland**, detainees were held in a **makeshift prison at a secret base near Szymany Airport, about 100 miles north of Warsaw**. All three of the C.I.A. prisoners who were **waterboarded** are believed to have been held in Poland, including . . . Abd al-Rahim al-Nashiri, who is charged in the 2000 bombing of the American destroyer Cole."

- Charlie Savage, *U.S. Prepares to Lift Ban on Guantánamo Cases*, NEW YORK TIMES (Jan. 19, 2011), http://www.nytimes.com/2011/01/20/us/20trials.html
  - "[H]e was previously held in secret Central Intelligence Agency prisons and is one of three detainees known to have been subjected to the drowning technique known as waterboarding";
  - "Last year, Polish prosecutors investigating a now-closed C.I.A. prison granted Mr. Nashiri 'victim status.'"

- Mark Mazzetti, *C.I.A. Document Details Destruction of Tapes*, NEW YORK TIMES (Apr. 15, 2010), http://www.nytimes.com/2010/04/16/us/16tapes.html
  - "**In 2002, C.I.A. operatives in Thailand videotaped the interrogations of** Abu Zubaydah and **Abd al-Rahim al-Nashiri**, two Qaeda suspects whom the C.I.A. was holding in secret in that country."

- Times Topics, *Abd al-Rahim al-Nashiri*, NEW YORK TIMES (Apr. 11, 2012), http://topics.nytimes.com/topics/reference/timestopics/people/n/abd_alrahim_al_nashiri/index.html
  - Goes into detail about the interrogation techniques used, including:
    - "one of three detainees subjected to the suffocation technique called waterboarding";
    - "**the C.I.A. inspector general called his the "most significant" case of a detainee who was brutalized in ways that went beyond the Bush administration's approved tactics**";
    - "the inspector general said, Mr. Nashiri's interrogators threatened him with a power drill in a mock execution"

- Mark Mazzetti, *U.S. Says C.I.A. Destroyed 92 Tapes of Interrogations*, NEW YORK TIMES (Mar. 2, 2009), http://www.nytimes.com/2009/03/03/washington/03web-intel.html?scp=7&sq=nashiri+and+thailand&st=nyt
  - "The tapes had been held in a safe at the C.I.A. station in Thailand, the country where two detainees – Abu Zubaydah and Abd al-Rahim al-Nashiri – were interrogated."

CNN

- Tim Lister, *Ten years of 'Gitmo' -- and more to come*, CNN (Jan. 11, 2012), http://www.cnn.com/2012/01/11/world/analysis-gitmo-ten-years/index.html

- "Al-Nashiri's case is emblematic of much of the controversy swirling around Guantanamo. The CIA inspector-general found in 2004 that he was water-boarded and had a power-drill revved close to his head while being interrogated in 2002 at a 'black site' in Thailand, which may complicate the task of prosecuting him."

Associated Press

- Adam Goldman, *Report: CIA officer implicated in abuse case back at* work, ASSOCIATED PRESS (Sept. 7, 2010), http://www.msnbc.msn.com/id/39043456/ns/us_news-security/#
  - "Al-Nashiri was captured in Dubai in November 2002 and was taken to another CIA secret prison in Afghanistan known as the Salt Pit – a facility that figures in a separate Durham prosecution of a detainee death in 2002. Al-Nashiri was flown to still another secret CIA prison in Thailand, where he stayed briefly, then taken to the Poland prison on Dec. 5, 2002, just days after that facility was opened. In Poland, al-Nashiri was subjected to a series of enhanced interrogation techniques – including some not authorized by Justice Department guidelines."
  - "According to the review, Albert took an unloaded semiautomatic handgun to the cell where al-Nashiri was shackled. The officer then racked the slide — a cocking action — of the unloaded weapon once or twice next al-Nashiri's head, according to the review."
  - "The special review said that, probably on the same day, Albert revved a power drill to frighten al-Nashiri, who had been left naked and hooded"

- *New Charges Filed Against Suspect in U.S.S. Cole Bombing,* ASSOCIATED PRESS (Apr. 20, 2011), http://www.nytimes.com/2011/04/21/us/21gitmo.html?scp=2&sq=nashiri+and+poland&st=nyt
  - "Mr. Nashiri was **captured in Dubai** in November 2002 and flown to **a C.I.A. prison in Afghanistan known as the Salt Pit** before being moved to a clandestine C.I.A. facility in **Thailand**, where he was **waterboarded twice**."

Wall Street Journal:

- Jess Bravin, *Treatment of Suspect Is Issue in Cole Trial*, WALL STREET JOURNAL (Jan. 17, 2012), http://online.wsj.com/article_email/SB10001424052970204555904577167570435510912-lMyQjAxMTAyMDAwNDEwNDQyWj.html?mod=wsj_share_email
  - "The shackles, by which Mr. Nashiri's legs are attached to a bolt in the floor, **recall his conditions when agents put a gun to his head and threatened him with a power drill**, said Mr. Kammen, a civilian death-penalty specialist from Indianapolis. He said the shackles could trigger post-traumatic stress disorder in Mr. Nashiri."
  - "The **gun and power-drill incidents were detailed in a long-withheld 2004 Central Intelligence Agency report released in 2009**. The government didn't

dispute Mr. Kammen's account at the hearing and didn't have immediate comment afterward."

- Jess Bravin, *Cole Suspect's Trial Tests Gitmo Rules*, WALL STREET JOURNAL (Nov. 10, 2011), http://online.wsj.com/article_email/SB10001424052970204224604577028240352809390-lMyQjAxMTAyMDAwNDEwNDQyWj.html?mod=wsj_share_email

    - "The Saudi-born Mr. Nashiri spent years in the secret prisons of the Central Intelligence Agency after his 2002 capture, where he **was one of three detainees the government acknowledges were waterboarded during a harsh interrogation regime defense attorneys describe as torture**. Mr. Nashiri's attorneys indicated that their strategy could focus on his treatment."

- Dan Slater, *Gov't Seeks Death for Saudi Charged With USS Cole Bombing*, WALL STREET JOURNAL (June 30, 2008), http://blogs.wsj.com/law/2008/06/30/govt-seeks-death-for-saudi-charged-with-uss-cole-bombing/?blog_id=14&post_id=6066

    - "Last year, at a Gitmo hearing, Nashiri confessed to helping plot the Cole bombing only because he was tortured by U.S. interrogators. **The CIA conceded that Nashiri was among terrorist suspects subjected to waterboarding in 2002 and 2003**."

- Siobhan Gorman, Peter Spiegel, Cam Simpson, *Special Prosecutor to Probe CIA Handling of Terror Suspects*, WALL STREET JOURNAL (Aug. 25, 2009), http://online.wsj.com/article_email/SB125111559865553571-lMyQjAxMTIyNTAxNDEwMTQ1Wj.html?mod=wsj_share_email

    - ". . . the Justice Department released a heavily redacted report from the CIA's inspector general . . . ."

    - "The report describes the threat of the use of a handgun and power drill on the alleged architect of U.S.S. Cole bombing, Abd al-Rahim al-Nashiri. The debriefer took an unloaded semiautomatic handgun and simulated a bullet being chambered twice near Mr. Nashiri's head."

    - "That debriefer also helped stage a 'mock execution,' in which a gun was fired outside an interrogation room and a guard, dressed up to look like a hooded detainee, posed motionless on the ground when the real detainee passed to 'appear as if he had been shot to death.'"

    - "Mr. Nashiri was also held in 'potentially injurious stress positions' that hadn't been specifically authorized that could have dislocated his arms from his shoulders. Interrogators also used 'a stiff brush that was intended to induce pain' on Mr. Nashiri, and they stood on his shackles, which resulted in cuts and bruises on his ankles."

The Guardian

- The Guantanamo Files: The documents, *Guantánamo detainee file: Abd al-Rahim Hussein Muhammad Abdah al-Nashiri US9AF-010015DP*, THE GUARDIAN (Apr. 24, 2011), http://www.guardian.co.uk/world/guantanamo-files/US9SA-010015DP

- Peter Beaumont, *Bombshell report on CIA interrogations is leaked*, THE GUARDIAN (Aug. 22, 2009), http://www.guardian.co.uk/world/2009/aug/22/cia-interrogation-report-leaked
    - "The report is understood to describe mock executions where interrogators tried to get detainees to talk by firing a gun in an adjoining room to pretend another prisoner had been killed. According to leaked information from the report, Abd al-Rahim al-Nashiri was threatened with a drill and gun during his detention at one of the CIA's so-called black site prisons after his capture in 2002. He was subjected to the near-drowning technique known as waterboarding, as were two other al-Qaida leaders."

Globalsecurity.org

- Profile on Abd al-Rahim al-Nashiri, GLOBALSECURITY.ORG, http://www.globalsecurity.org/security/profiles/abd_al-rahim_al-nashiri.htm

Voice of America

- *Al-Qaida Suspect Files Human Rights Case Against Poland*, VOICE OF AMERICA (May 9, 2011), http://www.voanews.com/english/news/usa/Al-Qaida-Suspect-Files-Human-Rights-Case-Against-Poland-121579139.html
    - "The lawyers claim that Saudi Arabian Abd al Rahim al-Nashiri, 46, was held and tortured in a secret CIA so-called 'black site' prison in an intelligence base north of Warsaw from December 2002 to June 2003."

U.S. Government documents:

- *The 9-11 Commission Report*, Chapter 5.1 (July 22, 2004): http://govinfo.library.unt.edu/911/report/911Report.pdf

- CIA Inspector General's Report (May 7, 2004), *Counter-Terrorism Detention and Interrogation Activities (September 2011 – October 2003)* (declassified): http://media.washingtonpost.com/wp-srv/nation/documents/cia_report.pdf (details the use of various enhanced interrogation techniques; including at 36):
    - psychologist/interrogators began Al-Nashiri's interrogation using EITs immediately upon his arrival.
    - Al-Nashiri provided lead information on other terrorists during his first day of interrogation.

- On the twelfth day of interrogation, [redacted] psychologist/interrogators administered two applications of the waterboard to Al-Nashiri during two separate interrogation sessions.
- Enhanced interrogation of Al-Nashiri continued through 4 December 2002[.]

(at 42):

- 28 December 2002 and 1 January 2003, the debriefer used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing information. After discussing this plan with [redacted] the debriefer entered the cell where Al-Nashiri sat shackled and racked the handgun once or twice close to Al-Nashiri's head. . . . On what was probably the same day, the debriefer used a power drill to frighten Al-Nashiri. With [redacted] consent, the debriefer entered the detainee's cell and revved the drill while the detainee stood naked and hooded. The debriefer did not touch Al-Nashiri with the power drill

(at 44):

- OIG received reports that interrogation team members employed potentially injurious stress positions on Al-Nashiri. Al-Nashiri was required to kneel on the floor and lean back. On at least one occasion, an Agency officer reportedly pushed AI-Nashiri backward while he was in this stress position. On another occasion [redacted] said he had to intercede after [redacted] [redacted] expressed concern that Al-Nashiri's arms might be dislocated from his shoulders. [redacted] explained that, at the time, the interrogators were attempting to put Al-Nashiri in a standing stress position. Al-Nashiri was reportedly lifted off the floor by his arms while his arms were bound behind his back with a belt.

- Defense Report 2007 – Transcript of Combatant Status Review Tribunal Hearing, http://projects.nytimes.com/guantanamo/detainees/10015-abd-al-rahim-al-nashiri/documents/7
  - Al-Nashiri on his torture – claims "From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way."
  - Says he was tortured up until he was brought to Guantanamo, at which point the "pressure" ceased.

Jurist:

- Caitlin Price, *CIA chief confirms use of waterboarding on 3 terror detainees*, JURIS (Feb. 5, 2008), http://jurist.law.pitt.edu/paperchase/2008/02/cia-chief-confirms-use-of-waterboarding.php

- Gabriel Haboubi, *Guantanamo detainee says torture prompted confession to USS Cole bombing*, JURIST (Mar. 30, 2007), http://jurist.law.pitt.edu/paperchase/2007/03/guantanamo-detainee-says-torture.php

This is just a sampling of the readily available public information. The Commission can, indeed *must*, take notice of the extensive amount of information that is already in the public domain – much of it as a direct result of official U.S. Government statements and publications – concerning the arrest, detention and rendition of this defendant. There is simply no basis for closing proceedings that address information already in the public domain. *See, e.g., In re Charlotte Observer*, 882 F.2d 850, 853-55 (4th Cir. 1989) (finding it "dubious" that harm to defendant's fair trial rights will result from re-publication of information already in the public domain; and, "[w]here closure is wholly inefficacious to prevent a perceived harm, that alone suffices to make it constitutionally impermissible."); *In re New York Times*, 828 F.2d 110, 116 (2d Cir. 1987) (holding that sealing of court papers is not proper where much of the information contained in them "has already been publicized"); *CBS v. United States Dist. Court*, 765 F.2d 823, 825 (9th Cir. 1985) (finding that a substantial probability of prejudice cannot exist when "most of the information the government seeks to keep confidential concerns matters that might easily be surmised from what is already in the public record").

To shield from public view the arguments of counsel about information already known to the public would violate the public's constitutional rights and undermine the legitimacy and credibility of military commissions. "'Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.'" *United States v. Brown*, 22 C.M.R. 41, 45 (C.M.A. 1956) (quoting Wigmore, *Evidence* § 1834 (3d ed.)), *overruled, in part, on other grounds by United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977);

United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) ("public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public."); *United States v. Hood*, 46 M.J. 728, 731 & n.2 (A. Ct. Crim. App. 1996) ("'Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'" (quoting *Press-Enterprise I*, 464 U.S. at 508)).

Nor does it satisfy the Government's obligation simply to suggest that use of the 40-second delay switch to temporarily close portions of a proceeding is a narrow limitation of the access right. The First Amendment right of access to judicial proceedings is a right of *contemporaneous* and *timely* access to information. *See, e.g.*, *Lugosch*, 435 F.3d at 126-27 (emphasizing "the importance of immediate access where a right to access is found"); *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979) ("the first amendment protects not only the content of speech but also its timeliness"). As the Supreme Court observed in *Nebraska Press Association v. Stuart*, "[d]elays imposed by governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly." 427 U.S. at 560-61. Put simply, "'each passing day may constitute a separate and cognizable infringement of the First Amendment.'" *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (quoting *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319, 1329 (1975) (Blackmun, J., in chambers)); *Lugosch*, 435 F.3d at 126-27 ("'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury'") (citation omitted).

Before any aspect of the proceeding may be closed, the Government must satisfy the four elements of its constitutional burden. The fact that it was able to present its written legal objections without reference to any sealed information only further reinforces the conclusion that defendant's pending discovery motions can be resolved without any need for secret proceedings.

6. **Oral Argument.** The Press Objectors are prepared to argue this motion if oral argument would be useful to the Commission, but otherwise rest on these written objections.

7. **Attachments.**

A. Certificate of Service, dated July 12, 2012.

WHEREFORE, Press Objectors respectfully ask this honorable Tribunal to deny any request to close any portion of the proceedings in this prosecution unless the Government first makes the strict factual showing required to overcome the constitutional right of public access.

Dated: July 12, 2012
New York, New York

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CERTIFICATE OF SERVICE

I certify that on the 12th day of July 2012, I filed AE 093, Response/Opposition by 14 News Organizations to Potential Closure of Hearing on Defense Motions, with the Office of Military Commissions Trial Judiciary and served a copy on counsel by emailing it to the following:

Chief Clerk of the Trial Judiciary
Donna Wilkins
Ret. Navy Vice Admiral Bruce MacDonald
Army Brig. Gen. Mark Martins
Marine Col. Jeffrey Colwell
Anthony Mattivi, Esq.
Navy Lt. Cmdr. Stephen Reyes

Jacob P. Goldstein, Esq.